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No.

In The

Supreme Court of the United States

October Term, 1997

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Petitioners,

vs.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* ("ADEA") for an employer to subject an employee to an adverse employment action based on that employee's age if age-pejorative perceptions or age stereotyping are not implicated in that adverse action?

2. Is it a violation of the ADEA if an adverse employment action based on age can be justified by an employer's economic considerations?

3. Is it a violation of the ADEA for an employer to subject an employee to an adverse employment action based on the proximity of that employee to a predetermined (mandatory or voluntary) retirement age?

4. If a disparate impact claim is cognizable in an ADEA case, can it be limited to a sub-group of employees consisting of the oldest employees in the applicable pool, *e.g.*, those age 55 and over?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Statute and Regulations Involved	1
Statement of the Case	1
Reasons for Granting the Writ	4
I. The Second Circuit Has Construed The Adea, On Several Substantial Questions, In A Way That Conflicts With The *Hazen* Decision Of This Court And With Other Circuits.	4
A. The Pre-*Hazen* Status Of The Law.	4
B. The *Hazen* Decision.	7
C. The Impact Of *Hazen*.	8
1. The Age Stereotyping Question.	11
2. The Economic "Safe Harbor" Question.	13

Contents

Page

3. The Proximity to Retirement Question. 17

II. There Is A Conflict In The Circuits As To Whether A Disparate Impact Claim Is Viable In An ADEA Sub-Group Case. 21

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) 7

Barnes v. GenCorp., 896 F.2d 1457 (6th Cir. 1990) ... 22

Blum v. Witco, 829 F.2d 367 (3rd Cir. 1987) 22

EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984), *amended*, 998 F.2d 641 (9th Cir. 1993) 5, 7, 19, 22

EEOC v. California Micro Devices Corp., 869 F. Supp. 767 (D. Ariz. 1994) 5

EEOC v. Chrysler, 733 F.2d 1183 (6th Cir. 1984) 6, 17

EEOC v. City of Altoona, 723 F.2d 4 (3rd Cir. 1983) . 6, 17, 18

EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994) 10

Contents

Page

EEOC v. Local 350, Plumbers & Pipefitters, 982 F.2d 1305 (9th Cir. 1992), *amended*, 998 F.2d 641 (9th Cir. 1993) 5, 7, 19

EEOC v. Westinghouse, 725 F.2d 211 (3rd Cir. 1983) . 5, 7, 19

Geiger v. AT&T Corp., 962 F. Supp. 637 (E.D. Pa. 1987) 10, 12, 19

Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1982), *cert. denied*, 451 U.S. 945 (1981) 21

Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S. Ct. 1701 (1993) ..... *passim*

Heath v. Massey-Ferguson Parts Corp., 869 F. Supp. 1379 (E.D. Wis. 1994), *rev'd on other grounds, sub nom, Heath v. Varity Corp.*, 71 F.3d 256 (7th Cir. 1995) 10, 19

Johnson v. State of New York, 49 F.3d 75 (2nd Cir. 1995) 19, 20

Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) 21

Lowe v. Commack Union Free School District, 886 F.2d 1364 (2nd Cir. 1989) 21, 22, 23

Marshall v. Sun Oil, 605 F.2d 1331 (5th Cir. 1979) ... 22

Contents

	Page
Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987)	9, 10
Mistretta v. Sandia, 15 F.E.P. 1690 (D.N.M. 1977), *aff'd sub nom, EEOC v. Sandia*, 639 F.2d 600 (10th Cir. 1980)	22
Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743 (7th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983)	6
Polstroff v. Fletcher, 452 F. Supp. 17 (D. Al. 1978)	22
Sheerin v. New York Division of Substance Abuse Services, 844 F. Supp. 909 (N.D.N.Y. 1994)	5, 7, 18, 19
Smallwood v. United Air Lines, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982)	6, 17
Sperling v. Hoffman-La Roche, Inc., 924 F. Supp. 1346 (D. N.J. 1996)	10, 12, 19
Tuck v. Henkel Corp., 973 F.2d 371 (4th Cir. 1992), *cert. denied*, 113 U.S. 1276 (1992)	5, 7, 18, 19

Statutes Cited:

28 U.S.C. § 1254(1)	1
29 U.S.C. § 621	9
29 U.S.C. § 621, *et seq.*	i

Contents

	Page
29 U.S.C. § 621(a)(2)	18
29 U.S.C. § 621-634	1
29 U.S.C. § 623(f)	16
29 U.S.C. § 623(f)(1)	6, 13
29 U.S C. § 623(f)(2)	15, 16, 18
42 U.S.C. § 2000(e), *et seq.*	22
Pub. L. 102-166	22
Other Authorities Cited:	
14 C.F.R. § 121.383(c)	1, 3
29 C.F.R. § 1625.7(d)	1, 23
House Report No. 805, 90th Cong., 1st Sess., *reprinted in* USSCAN 2213 (1967)	16
Senate Report No. 95-493, 94th Cong., 2d Sess. (1978), *reprinted in* 1978 USSCAN 504	16, 18
Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. 229	9
Sloan, *Comment: Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 Wis. L. Rev. 507	9

Contents

Page

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit Decided July 11, 1997 ..... 1a

Appendix B — Excerpted Transcript of Motion of the United States District Court for the Eastern District of New York Dated December 13, 1995 ..... 10a

Appendix C — Excerpted Transcript of Civil Cause for Motion of the United States District Court for the Eastern District of New York Dated October 26, 1995 ..... 14a

Appendix D — Relevant Statutes and Regulations 20a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 119 F.3d 102 (2nd Cir. 1997),[1] and is reprinted in the Appendix beginning at 1a.[2] The opinion of the United States District Court for the Eastern District of New York was not reported.

STATEMENT OF JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on July 11, 1997.

This Court has jurisdiction of this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (the "ADEA"), the pertinent sections of which are reprinted in the Appendix at 20a-24a. The regulations involved are 14 C.F.R. § 121.383(c) and 29 C.F.R. § 1625.7(d), which are also reprinted in the Appendix at 25a-28a.

STATEMENT OF THE CASE

Pursuant to an asset purchase agreement entered into on July 27, 1991 (the "APA"), Pan American World Airways, Inc.

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1. The Second Circuit's slip opinion is reproduced in the Appendix to this Petition; the official report was not available at the time this Petition was prepared.

2. References followed by an "a" are to page numbers of the Appendix to this Petition.

("Pan Am") agreed to sell, and Delta Airlines, Inc. ("Delta") agreed to acquire, certain of Pan Am's operating assets, equipment and routes. Under the APA, Delta also agreed to hire a number of former Pan Am pilots to fly its equipment, and it authorized Pan Am to identify, interview, screen and retrain the Pan Am pilots for potential hire or re-hire by Delta.

Petitioners, former senior pilots of Pan Am, age 55 and over, allege that Delta violated the ADEA by designing and causing Pan Am to implement a series of pilot selection procedures which minimized the number of the oldest pilots which Delta would have to hire, *i.e.*, those aged 55 and above. Petitioners also allege that the selection criteria and procedures designed by Delta, and utilized by Pan Am, resulted, in fact, in a disproportionately small number of former Pan Am pilots, age 55 and older, actually being hired by Delta.

In granting Delta's motion for summary judgment, the Eastern District of New York issued no written opinion or decision; it made a statement at the conclusion of oral argument to the effect that Delta had merely acquired a "turn key" operation from Pan Am and thus played no role in the actual selection process. (17a). Petitioners moved to renew and reargue, and the District Court adhered to its prior decision. (12a).

The Second Circuit, on July 11, 1997, affirmed the grant of summary judgment, but on different grounds — not discussed or considered by the District Court or raised or briefed on appeal. It found that Delta's ageist directives to Pan Am and its failure to hire large numbers of the oldest Pan Am pilots reflected manpower planning concerns.[3] It further found that such Pan

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3. Some of Delta's directives adduced in the record below were: "... one strategy being offered [is] to reduce the number of senior Pan American personnel who would enter the Delta work force ..."; "we

(Cont'd)

Am pilots if hired, would, within a few years thereafter, have been forced to retire under an age-60 mandatory retirement rule promulgated by the Federal Aviation Administration, 14 C.F.R. § 121.383(c). (25a). The Second Circuit observed that "Delta's concerns about the economics of hiring too many older pilots approaching mandatory retirement were not discriminatory within the meaning of the ADEA, even though their retirements were required by law at a specified age, and not determined by years of service or some other yardstick." (7a). The Second Circuit also found that in such a case Delta's "concern about the economic consequences of employment decisions [did] not constitute age discrimination under the ADEA, even though there may be a correlation with age," citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993). (6a).

The Second Circuit also addressed Plaintiffs' disparate impact claim, holding that while it recognized the disparate impact theory of liability under the ADEA, any claim thereunder "must allege a disparate impact on the entire protected group, *i.e.*, workers aged 40 and over" (8a), and it could not be based, as at bar, on showing adverse impact to only a sub-set of victims, *i.e.*, those age 55 and over.

(Cont'd)

[Delta] are faced with a very senior group of pilots coming over in the acquisition"; "Pan Am's pilot workforce is 'contaminated' "; "50% retire 2001 not 1995;" "224" pilots will retire in "5 years"; "As we hire them as pilots, we hope to get 30, 35 years of dedicated, professional, loyal service in the service of Delta Air Lines . . ."; "Can you redo that [list] to key LOS [length of service] not age"; "Those we take with high seniority will work a few years and expect full medical/dental coverage"; "Interview — choose good range of age/seniority/sex."

These statements reveal a clear disinclination on Delta's part to having too large a number of the oldest Pan Am pilots join its job ranks.

For the reasons discussed herein, the Petition for a Writ of Certiorari as to Question Nos. 1-3 should be granted at this time. As to Question No. 4, relating to the applicability of the disparate impact doctrine to an ADEA subclass, *i.e.*, those persons age 55 and over, Petitioners recognize that the threshold issue, whether the so-called disparate impact analysis is cognizable for claims under the ADEA, has not yet been decided by this Court and, for that reason, this Court may wish to decline to address Question No. 4 as being premature. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993). Petitioners respectfully request, however, that if a petition for certiorari on the issue of disparate impact viability in ADEA cases is granted by this Court for another case during the October 1997 Term of this Court, this Court should take up Question No. 4 for certification at that time.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT HAS CONSTRUED THE ADEA, ON SEVERAL SUBSTANTIAL QUESTIONS, IN A WAY THAT CONFLICTS WITH THE *HAZEN* DECISION OF THIS COURT AND WITH OTHER CIRCUITS.

A. The Pre-*Hazen* Status Of The Law.

Prior to *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993), Federal Courts uniformly took a pro-employee view of the ADEA on the issues of: (1) whether age pejorative stereotyping needed to be present in an employer's age-based decision; (2) whether an "economic considerations" defense was available to employers; and (3) whether an employer's decision based on an employee's chronological proximity to a fixed retirement age was actionable:

1) On the issue of whether an adverse employment action based on pejorative or invidious employee stereotyping by the employer was the only type of age discrimination covered by the ADEA, Federal Courts, prior to *Hazen*, found no such limitation. They uniformly held that an adverse employment decision, based on a factor such as an employee's proximity to a predetermined retirement age, was violative of the ADEA without requiring a further showing that the decision was motivated by an employer's inaccurate or stigmatizing stereotypes, or by any other age-pejorative factors. *EEOC v. Borden's Inc.*, 724 F.2d 1390, 1393 (9th Cir. 1984) (a policy which denied severance benefits to certain employees because they were 55 and older, and thus eligible for early retirement benefits, violated the ADEA. The court stated: "We do not require a showing of [the employer's] animus or ill-will toward older people."); *EEOC v. Local 350, Plumbers & Pipefitters*, 982 F.2d 1305 (9th Cir. 1992) (reaffirming *Borden's*), *amended*, 998 F.2d 641 at 648 n.2 (9th Cir. 1993) (affirming prior decision, even after *Hazen*); *EEOC v. California Micro Devices Corp.*, 869 F. Supp. 767, 772 at n.5 (D. Ariz. 1994) ("[B]oth *Borden* and *Local 350* refute Defendant's claim that unless a motivating factor is based upon an inaccurate or stigmatizing stereotype, then there can be no discrimination as a matter of law."); *Tuck v. Henkel Corp.*, 973 F.2d 371, 376 (4th Cir. 1992), *cert. denied*, 113 U.S. 1276 (1992) (employer can violate the ADEA when it terminates employees who reach age 62 [and thereby become eligible for early retirement benefits] "merely" to save on pension benefits. Court did not require proof that age-pejorative factors motivated the termination); *EEOC v. Westinghouse*, 725 F.2d 211, 222-223 and n.7 (3rd Cir. 1983) (eligibility for early retirement benefits so closely related to age that decisions based on same are violative of the ADEA. Proof that age-pejorative factors motivated the termination not required). *See also Sheerin v. New York Division of Substance Abuse Services*, 844 F. Supp. 909, 916 n.11 (N.D.N.Y. 1994) (when an employer's termination

decisions are based on retirement eligibility determined by age and years of service the ADEA is thereby violated).

2) On the issue of whether an adverse employment decision based on an employee's age is violative of the ADEA if it is also motivated by economic considerations, Federal Courts, prior to *Hazen*, held that an economics-based decision, as long as it involved an employee's age, did not qualify as either a reasonable factor other than age ("RFOA")[4] or a bona fide occupational qualification ("BFOQ")[5]; nor did such an economics-based decision otherwise exempt an employer from liability under the ADEA. *EEOC v. City of Altoona*, 723 F.2d 4 (3rd Cir. 1983) (economic considerations cannot be used to justify what is otherwise age discrimination); *EEOC v. Chrysler*, 733 F.2d 1183, 1186 (6th Cir. 1984) (economic considerations as to the application of a pension formula which depends on age is not a reasonable factor other than age); *Smallwood v. United Air Lines*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982) ("Economic considerations cannot be the basis for a BFOQ since precisely those considerations were among the targets of the act."); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 755 (7th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983) (mandatory retirement cannot be justified by cost-considerations).

3) On the issue of whether an adverse employment decision based not on age *per se*, but on a factor analytically intertwined or closely correlated with age, such as an employee's perceived proximity to a predetermined retirement age, is itself violative of the ADEA, Federal Courts, prior to *Hazen*, generally answered

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4. 29 U.S.C. § 623(f)(1).

5. *Ibid.*

this question in the affirmative. *Westinghouse, supra*; *Borden, supra*; *Local 350, supra*; *Tuck, supra*; *Sheerin, supra*. *See also Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125-27 (7th Cir. 1994) (reliance on an age-related factor violates ADEA when age is perfectly correlated with such a factor).

B. The *Hazen* Decision.

In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993), this Court promulgated what may be the most far-reaching decision rendered by it under the ADEA. In *Hazen*, this Court addressed the narrow question of whether an employment decision based not on age *per se*, but, rather, upon a factor related to age, *i.e.*, years of company service, constitutes age discrimination. In answering this question in the negative, this Court in broad language stated:

> We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.

Id. at 609, 113 S. Ct. at 1705.

This Court reached this conclusion based on the finding that the particular age-related factor in question, the employee's proximity to pension vesting, by virtue of having attained a number of years of accumulated company service, was "analytically distinct" from the factor of attaining a certain age. This Court reasoned that since the only requirement for vesting in the pension plan was attaining a number of years of company service, an employee younger than 40, and therefore outside the class of workers protected by the ADEA, could have his pension vest before an older worker who was newly hired. *Id.* at 611-12, 113 S. Ct. at 1707. Accordingly, the employer's

adverse decision, to the extent based on the employee's having accumulated a number of years of company service, could not be the legal equivalent of a decision based on the employee's attaining a certain age. *Id.*

This Court, however, expressly reserved decision in *Hazen* on the related question of whether the employer's basing a decision on an employee's pension status is violative of the ADEA where vesting is determined by the employee's reaching a certain *age*, rather than by attaining a number of years of company service. *Id.* at 613, 113 S. Ct. at 1707-08. This Court also left open the question of whether basing a decision on any age-related factor, where that factor is not analytically distinct from age (and without a further showing that the employer supposed a correlation between that factor and age), could itself be violative of the ADEA. *Id.* at 612-13, 113 S. Ct. at 1707.

Hazen, however, did not end with the discussion of the interplay between age and certain age-related factors. The decision then stated that pejorative perceptions and stereotyping of older workers were the essence of what the ADEA was enacted to prohibit. *Id.* at 619, 113 S. Ct. at 1706. The precise meaning of this assertion has spawned great debate among the Circuits on this and related issues.

C. The Impact Of *Hazen*.

Although the actual *Hazen* decision itself is narrowly based, some Federal Courts have used language in *Hazen* to revisit the issues discussed in Section A, *supra*, and, in so doing, have increasingly given conflicting answers to the questions previously noted — substantially rearranging the ADEA landscape in the process. In particular, the references in *Hazen* to age stereotyping, *i.e.*, that it constitutes the essence of the ADEA, has been extrapolated by some Federal Courts to suggest

that the only type of actionable age discrimination is that which involves age pejorative stereotyping. Other language *Hazen* has been extrapolated to bar an ADEA suit based on any age-related factor, regardless of whether that factor is analytically indistinct from age (unless the employer supposes a correlation between age and that factor).

As a result of *Hazen*, two (2) fundamentally conflicting views as to the ultimate goal of the ADEA have emerged and now appear to be in equipoise:

(1) The broader and more traditional view is that the ADEA was enacted not only to protect older workers against invidious stereotyping, but also to protect them because of their *status* as older workers *per se*, since older workers face unique obstacles late in their careers.[6] The Congressional findings on which the ADEA is based support this position. *See* 29 U.S.C. § 621: Congressional Statement of Findings and Purpose. (20a). Under this view, the ADEA is seen as broad-based protective

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6. *See* Sloan, *Comment: Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 Wis. L. Rev. 507, 521 ("the law's stated purpose [is to] protect older workers. . . ."; "the ADEA's stated policy goal [is] protecting workers from the obstacles they face competing in the labor market late in their careers.") *See also* Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. 229, 257 (Proponents of a certain view of the age discrimination statutes "would point . . . to indications that the Act was passed, in part, out of concern that unemployed older workers face unique obstacles in finding employment late in their careers"). *See also Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1205 (7th Cir. 1987) (the ADEA was "enacted in response to the problems older workers face in the job market including the obstacles that the long term employee encounters when he/she is suddenly without work. One of the very problems the ADEA intended to address was the likelihood that the employee will be less employable.").

legislation, designed not only to prevent employment decisions based on invidious age stereotyping, but also to safeguard older employees who are vulnerable *as a class*. Thus, employer decisions based on factors such as the higher cost of employing older workers or their proximity to retirement, which are functionally correlated with age, would contravene the ADEA.

(2) The narrower view is that the goal of the ADEA has no such grand purpose; rather, it was enacted solely to preclude employment decisions based on pejorative stereotypes of older workers. The ADEA is thus not seen as extending to employer decisions based on factors which do not implicate age stereotypes, such as factors relating to an employee's proximity to a predetermined retirement age or to the higher cost of employing older workers.[7] Under this view, the ADEA is viewed as having been enacted merely to prevent employers from assuming that merely because an individual has attained a certain age, he or she is no longer able to do the job, or do it as well.

Federal Courts interpreting *Hazen* have reached differing results on a number of subordinate questions which implicate this over-arching issue. To bring uniformity to this area, this Court should decide which of these two broad-based interpretations of *Hazen* is correct. Resolution of this issue goes to the very heart of the ADEA: The existence of inconsistent positions in the various Circuits makes enforcement of the ADEA difficult.

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7. *See Metz v. Transit Mix*, 828 F.2d 1202, 1213 (7th Cir. 1987) (dissenting opinion of Easterbrook, J.); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994); *Sperling v. Hoffman-La Roche, Inc.*, 924 F. Supp. 1346 (D. N.J. 1996); *Geiger v. AT&T Corp.*, 962 F. Supp. 637, 644 (E.D. Pa. 1987); *Heath v. Massey-Ferguson Parts Corp.*, 869 F. Supp. 1379, 1394 (E.D. Wis. 1994), *rev'd on other grounds, sub nom, Heath v. Varity Corp.*, 71 F.3d 256 (7th Cir. 1995).

Three (3) specific questions for certification, involving this over-arching issue, are drawn for this Court to consider.

1. The Age Stereotyping Question.

This Court stated, in *Hazen*, that "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen*, 507 U.S. at 610, 113 S. Ct. at 1706.

This assertion calls up Question No. 1 for review: Assuming that actionable age discrimination is typified by pejorative characterizations about older people, does that mean, preclusively, that this is the *only* type of age discrimination actionable under the ADEA — *i.e.*, that all other types of age discriminatory conduct, involving non-invidious or neutral views of older persons, are not violative of the ADEA?

Despite the "is the essence" assertion in *Hazen*, there is language in *Hazen* suggesting that pejorative stereotyping of older persons is *not* the only kind of age discrimination violative of the ADEA. This Court stated:

> Finally, we do not consider the *special case* where an employee is about to vest in pension benefits as a result of his age, rather than years of service, . . . and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with . . . benefits that would have vested by virtue of . . . years of service.

Id. at 613, 113 S. Ct. at 1707-08 (cites omitted). (Emphasis added.)

While this language implies that certain types of non-pejorative discrimination remain actionable under the ADEA (those decisions for which age is the decisive factor — regardless of pejorative motivation), some Federal Courts, following *Hazen*, have either ignored this language outright or have failed to recognize its implications. *See Sperling*, *supra*; *Geiger*, *supra*. These Courts have held that, unless pejorative age stereotyping actually informs the employer's decision, no ADEA violation has occurred.

The instant case is an appropriate one for this Court's review of Question No. 1 since it specifically addresses the issue of whether the ADEA requires a showing that the employer's adverse actions, although based on age *per se*, must also implicate some age pejorative stereotyping. At bar, the Second Circuit held that although the evidence adduced by Petitioners showed that Delta declined to hire pilots over age 55, because their ages were in proximity to a fixed retirement age, no age-pejorative stereotyping actually motivated Delta's actions.[8] Thus, the Court found no ADEA violation had occurred.

The case at bar is also appropriate for certification on Question No. 1 because it brings up for review the special case specifically reserved upon by this Court in *Hazen* — *i.e.*, whether it is an ADEA violation to subject an employee to adverse treatment by virtue of that employee reaching a predetermined age (which then results in acquiring a certain status, *i.e.*, vesting

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8. It should be noted that the Second Circuit found that no age-pejorative stereotypes were implicated despite the fact that Delta referred to its potentially older workforce as "contaminated". Moreover, the Circuit found that economic considerations motivated Delta's actions even though there was no showing, let alone an assertion, by Delta that there were significant additional costs associated with hiring pilots 55 and older, as compared to younger pilots.

in a pension plan or triggering a mandatory or voluntary retirement), rather than as a result of attaining a number of years of company service.

Here, Petitioners, in the Second Circuit's view, were refused employment by Delta because their respective ages, *per se*, were perceived as being in relative proximity to a predetermined mandatory retirement age, not because of their having worked a certain number of years at Delta or at Pan Am. Since Petitioners were not hired by Delta because of what their ages were, *per se*, this case should be reviewed by this Court on the specific question of whether an employment decision, based solely on an employee's attaining a certain age, is violative of the ADEA, *i.e.*, whether the presence of age stereotyping in the employers adverse decision is a *sine qua non* for an ADEA violation.

2. The Economic "Safe Harbor" Question.

Question No. 2 for certification by this Court is whether there is a so-called "economic considerations" safe harbor defense which will exempt an employer from liability under either of the ADEA's two statutory exceptions: (1) BFOQ; or (2) RFOA. 29 U.S.C. § 623(f)(1).

Specifically, this Court should decide whether the assertion by the Second Circuit, that "Delta's concern about the economics of hiring too many older pilots approaching mandatory retirement [was] not discriminatory within the meaning of the ADEA, even though there may be a correlation with age", is a proper interpretation of *Hazen*. (6a).

This case is appropriate for addressing Question No. 2 since it is grounded in clear and unambiguous language by the Second Circuit that economic considerations *do* provide a safe harbor

for otherwise illegal age-based actions. The Second Circuit has stated that *Hazen* "made clear that employment decisions driven by factors that are empirically intertwined with age are not discriminatory if they are motivated by '*some* feature other than the employee's age'. Thus, decisions motivated by economic concerns do not violate the ADEA." (Emphasis added, citing *Hazen* at 609). (6a-7a).

There is good reason to doubt the Second Circuit's ruling. Although the Circuit justified its ruling on the grounds of "considerations of the business effects . . .", (7a), no justification for such a broad "economic considerations" safe harbor can be inferred from the language of *Hazen*. *Hazen* merely stated, on this point, that there is "no disparate treatment under the ADEA when the factor motivating the employer is some feature *other than the employee's age*." *Id.* at 609, 113 S. Ct. at 1705. (Emphasis added.) The Second Circuit's interpretation of *Hazen* goes well beyond this statement. Nowhere in *Hazen* is there language that the mere existence of another motivating feature, besides age, is sufficient, by itself, to override an employers age-based motive. In effect, the Second Circuit extended the phrase "some feature other than age" to cover any "economic considerations" faced by an employer. Thus, under the Circuit's approach, an employer may freely discriminate on the basis of age as long as it can show that it derived an economic benefit from its actions.

The Second Circuit's reading, taken at face value, seems to contradict the statement in *Hazen* that "When the employer's decision is *wholly* motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Id.* at 611, 113 S. Ct. at 1706. (Emphasis added). This sentence in *Hazen* means only that the *absence* of age as a factor, *not* the *presence* of economic considerations, saves an employer from being held liable under the ADEA. This sentence also implies

that even if legitimate economic considerations motivated the employer's actions, the employer is still liable under the ADEA if ageist stereotyping is also implicated; *i.e.*, if stigmatizing stereotypes are present, the employer will be liable under the ADEA, since its decision could not have been "*wholly* motivated by factors other than age". (*Id.*, emphasis added).

Petitioners submit that the Second Circuit's reliance on an economic considerations "safe harbor" defense is unsupported by *Hazen*. Almost every adverse employment action, even those based on an employer's pejorative perceptions of an employee's performance, can be traceable (to a greater or lesser degree) to some economic considerations by the employer. Thus, the Second Circuit's "economic considerations" holding does far more than provide a safe harbor; it provides an all-purpose license for employers to eviscerate the protective scope of the ADEA.

That an economic considerations "safe harbor" was never contemplated by the ADEA is apparent by examining Section 623(f)(2) of the ADEA. (22a-23a). That Section provides that an employer may take into account the increased costs of providing certain benefits to older employees by adjusting the value downward of these benefits. That Section provides, however, only a narrow exception: While it allows an employer to cut fringe benefit costs, it expressly forbids an employer from denying or terminating employment altogether based on such cost-saving considerations. In fact, Section 623(f)(2) was included in the amendments to the ADEA in order to encourage and promote employers to hire or retain older employees — not to give employers an excuse for discharging them. The legislative history of the ADEA states:

> This exception serves to emphasize the primary purpose of the [ADEA] — hiring

> older workers — by permitting employment without necessarily including such workers in employee benefit plans. The specific exception . . . is considered vita [sic] to the legislation.

House Report No. 805, 90th Cong., 1st Sess., *reprinted in* USSCAN 2213, 2217 (1967).[9] If Congress had intended to allow a broad economic "safe harbor" to apply to hiring and termination decisions, as found by the Second Circuit, there would be no need for Section 623(f)(2) in the first place. Thus, by allowing age-based economic considerations to apply only in the limited and specific area of providing employee benefits, it is clear Congress intended to prohibit employers from denying employment altogether based on such factors.

Two conclusions emerge from the Second Circuit's decision on this issue: (1) To the extent that Delta's action not to hire Petitioners was based on the increased costs of providing for their pension benefits, as stated by the Second Circuit,[10] Delta's actions run counter to the limited exception set forth in Section 623(f) of the ADEA; (2) The failure of Congress to specifically provide for a general economic "safe harbor" defense reflects its intent to encourage the employment and retention of older workers generally *without* regard to their greater retention costs.

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9. *See also* Sen. Rep. No. 95-493, 95th Cong., 2d Sess., *reprinted in* 1978 USSCAN 504, 512 ("The purpose of this exception [Section 623(f)(2)] was to facilitate the hiring of older employers by permitting their employment without necessarily providing equal benefits under employee benefit plans.").

10. The Second Circuit stated: "The evidence [proffered by the Plaintiffs] might support an inference that Delta was reluctant to hire pilots who would shortly be disqualified from piloting and might begin drawing pension benefits." (6a).

Contrary to the Second Circuit's finding in the instant case, this economic justification defense has been given short shrift in other ADEA cases. *See Altoona, supra*; *Chrysler, supra*; *Smallwood, supra*. Accordingly, this conflict in the Circuits, as well as the Second Circuit's strained interpretation of *Hazen* on this point, should be resolved by this Court at this time through certification of Question No. 2.

3. The Proximity to Retirement Question.

In addition to the age stereotyping and economic "safe harbor" questions, discussed, *supra*, there is a need for this Court to consider Question No. 3, *i.e.*, whether it is permissible under the ADEA to subject an employee to adverse action because that employee is in mere proximity to a fixed or predetermined retirement age. This question is related to both Question Nos. 1 and 2, but it involves a separate issue which implicates an employer acting on the basis of an employee's future age-based status.

The Second Circuit, in answering this Question No. 3, held that an employer has the unfettered right to reach into the future and refuse to hire and/or fire an employee because of the employee's age. In particular, the Circuit held that Delta was justified in rejecting Petitioners because of "the inefficiency and expense of hiring large numbers of [older pilots] *on the verge of mandatory retirement*." (7a). (Emphasis added).

In so holding, the Second Circuit removed the ADEA protection from employees who are adversely treated because of their proximity to a predetermined mandatory or voluntary retirement age. Since any employee, at or around age 55, or even younger, can he viewed as being more or less on the verge

of a retirement at age 60, the Circuit's interpretation of *Hazen* would enable an employer to "jump the gun" by dismissing or refusing to hire an older employee who is several years away from actual retirement, simply because that employee is perceived to be "on the verge of retirement".[11]

This holding has more troubling implications than the "economic considerations" defense raised in Question No. 2: In the latter case, the employer is at least positing a countervailing or non-age based rationale for its actions. In taking adverse action on the grounds of an employee's chronological proximity to fixed retirement age, the employer is acting solely on the factor of the employee's age.

The Circuit's holding seems to run contrary to the ADEA's specific prohibition against the mandatory retirement of older workers. 29 U.S C. § 623(f)(2). The holding would also seem to run counter to decisions from other Federal Courts which have held that where an employer's actions have the effect of forcing the retirement of its employees, the ADEA is violated. *Altoona*, *supra*; *Tuck*, *supra*; *Sheerin*, *supra*.

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11. Indeed, in expressing its statement of findings and purpose for the enactment of the ADEA, Congress pointedly found that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice, . . ." It is submitted that the Second Circuit's holding that an employee age 55 is "on the verge of mandatory retirement," when retirement is five (5) years away, will encourage employers in "the setting of arbitrary age limits." 29 U.S.C. § 621(a)(2). (20a).

See also legislation history of the ADEA Senate Report No. 95-493, 94th Cong., 2d Sess. (1978), *reprinted in* 1978 USSCAN 804, 806. ("For capable, older workers the retirement decision should be an individual option. Maximum freedom of choice should be given to employees in deciding when to retire. . . .").

Although many Federal Courts have found that taking into account an employee's proximity to retirement is prohibited by the ADEA, *Westinghouse*, *supra*; *Borden*, *supra*; *Local 350*, *supra*; *Tuck*, *supra*; *Sheerin*, *supra*; other Federal Courts have found to the contrary. *See Sperling*, *supra*; *Geiger*, *supra*; *Heath*, *supra*. Thus, there is a clear split of authority on Question No. 3, warranting review of same by this Court.

The extent of the confusion in the Federal Courts on this issue is apparent upon examining *Johnson v. State of New York*, 49 F.3d 75 (2nd Cir. 1995). This case, decided by the Second Circuit less than two years before the instant case, contains an analysis and holding completely contradictory to the instant case. In *Johnson*, the plaintiff claimed that the State of New York had violated the ADEA when it adopted the Federal Air National Guard's mandatory age 60 retirement policy for security personnel at an Air National Guard base. The State argued that its policy was not motivated by age-based stereotypes, but rather was based on various non-age-based related reasons, and, as such, did not violate the ADEA under *Hazen Paper*.[12] The Circuit rejected this reasoning:

> The State's reliance on *Hazen Paper* is unavailing. The flaw in the State's argument is that the decision to require dual status, with consequent mandatory retirement age 60 . . . is not merely *correlated* with age; unlike *Hazen Paper*, the employer's decision here

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12. Three age-neutral reasons were given by the State: (1) to ensure security guards are "fully trained in accordance with current standards of military practice"; (2) to insure that "guards are familiar with military protocol and the equipment they are assigned to protect"; and (3) to assure that "guards are available to accompany their unit in the event the unit is activated." *Id.* at 77.

> in fact *implements* an age-based criterion. Regardless of the state's reasons for requiring that certain of its civilian employees maintaining memberships, there can be no doubt that Johnson's age actually played a role . . . and had a "determinative influence" on the decision to terminate his employment . . . In this case, age and termination are inextricably linked. The sole reason for Johnson's loss of dual status and his consequent termination was age.

Id. at 79-80 (emphasis in original).

Thus, the Second Circuit held, in *Johnson*, that a policy which, in effect, required the retirement of persons age 60 and over was a *per se* violation of the ADEA without the need for further proof that any age-based stereotype or other age-pejorative factor actually motivated the employer's decision. Furthermore, the Circuits statement, "Regardless of the state's reasons . . . ," suggests that there is no reason, cost-based or otherwise, behind which an employer may hide.[13]

The facts of *Johnson* are similar to those of the instant case. In both cases, plaintiffs proffered evidence that the employer had a policy of not hiring employees who were of a certain age or older because of their perceived proximity to a fixed retirement age. Thus, it seems that the Second Circuit itself is confused about how to apply *Hazen*.

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13. The Circuit did not address the question of the BFOQ exception in the case since the State explicitly disavowed reliance on the BFOQ defense. *Id.* at 80. Thus, under *Johnson*, if economic considerations could excuse age-based employment decisions in any respect, those reasons would have to qualify as a BFOQ.

In sum, it is submitted that the Second Circuit's interpretations of *Hazen*, (a) in requiring the presence of age stereotyping; (b) in allowing an economic considerations defense; and (c) in finding terminations based on proximity to retirement to be non-actionable, are in error. Moreover, as there is a substantial split in the Circuits as to Question Nos. 1-3, the Petition for a Writ of Certiorari should be granted.

II.

THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER A DISPARATE IMPACT CLAIM IS VIABLE IN AN ADEA SUB-GROUP CASE.

On the issue of whether claims of age discrimination based on the disparate impact theory are cognizable under the ADEA, most Federal Courts have held that the disparate impact doctrine is alive and well. *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1982), *cert. denied*, 451 U.S. 945 (1981); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983). This Court, however, has not decided this issue.

The Second Circuit has held in the instant case that a disparate impact claim, if viable under the ADEA, cannot, however, be based upon evidence that a particular policy has a disparate impact on only a segment of a protected group, *e.g.*, those over age 55, relying on *Lowe v. Commack Union Free School District*, 886 F.2d 1364 (2nd Cir. 1989). Thus, although it has recognized the disparate impact theory under the ADEA, it has limited the theory to "the entire protected group, *i.e.*, workers aged 40 and over." (8a).

The Second Circuit's holding is in direct conflict with: (a) those Circuits which recognize the disparate impact theory

without any age subset limitation; and with (b) those Circuits which reject the disparate impact theory outright.

Since the Ninth Circuit has accepted age-banding in disparate impact cases, *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984) (disparate impact analysis allowed with a 55 and over age-break), a direct conflict is presented with that Circuit which, in and of itself, warrants review of this question by this Court.

There are other reasons why this issue should be reviewed: It is clear that age-banding is generally accepted by various Federal Courts in ADEA cases under the disparate treatment theory. The Third Circuit approved the use of age-bands of 40 and 45 in *Blum v. Witco*, 829 F.2d 367 (3rd Cir. 1987). In *Barnes v. GenCorp.*, 896 F.2d 1457 (6th Cir. 1990), the Sixth Circuit allowed age-bands at 48, 52, 55 and 60. Other cases using age-bands include *Mistretta v. Sandia*, 15 F.E.P. 1690 (D.N.M. 1977), *aff'd sub nom, EEOC v. Sandia*, 639 F.2d 600 (10th Cir. 1980) (comparisons made at age-bands 55 and 60), *Marshall v. Sun Oil*, 605 F.2d 1331 (5th Cir. 1979) (age-bands at 40, 50 and 60), and *Polstroff v. Fletcher*, 452 F. Supp. 17 (D. Al. 1978) (comparisons made at age-band of 55).

The Civil Rights Act of 1991, ("CRA"), Pub. L. 102-166, was signed into law on November 21, 1991, two (2) years after *Lowe v. Commack Union, supra*, was decided by the Second Circuit. Although the court in *Lowe* held that a disparate impact theory is not viable in an ADEA sub-set action, *Lowe* ignored the fact that the CRA was intended to apply to *all* laws modelled after Title VII (The Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et seq.*), including the ADEA.

Because the Federal Equal Employment Opportunity Commission ("EEOC") has recognized that the disparate impact

theory applies fully to the ADEA, 29 C.F.R. § 1625.7(d), (26a-28a), this Court may wish to consult with the EEOC as to whether the question of ADEA sub-setting should now be certified to this Court.

Since disparate impact claims brought under the ADEA should be treated in the same manner as under Title VII, as amended, and since the disparate impact theory *is* a clearly viable theory for Title VII sub-set claims, it is submitted that this theory should be equally viable to ADEA sub-set claims: Congress could not have intended for neutral employment practices to be unlawful under the ADEA only if they discriminated against *every* employee age 40 and over in the relevant job pool. Yet the Second Circuit, in *Lowe* and in the instant case, has taken the incongruous position that an employer who discriminates against only a certain age segment of the protected class (even where these employees are the oldest) is not liable. This enables an employer to discriminate against those aged 50 and over as long as it spares those age 40-49 from discriminatory treatment. This result is plainly illogical.

Although Congress established age 40 and over as the group to be protected by the ADEA, nothing in it suggests that a facially neutral employment practice should be found unlawful only if it discriminates across the board against *every* applicant or employee age 40 and over in the relevant job pool. Just as an employer may be found to disparately treat employees over a certain age, *i.e.*, 50 or 60, a facially neutral employment practice may also have an adverse impact on that class of employees.

The conflict between the Circuits as to whether a disparate impact claim is viable in an ADEA sub-group case will continue to cause uncertainty in the administration of the ADEA. In particular, the fate of employees age 55 and over, or those with five (5) years or fewer left of gainful employment, who may be

terminated because they are "on the verge of retirement," should not be left to such uncertainty.

If the holding in the instant case is permitted to stand, confusion in this area will continue. Employers will seek to terminate employees nearing a fixed retirement age by articulating a facially neutral policy, after the fact, as a justification for their actions. The application of the disparate impact theory should be applied consistently for all ADEA litigants; it should not depend on the Circuit in which the parties are found.

This Court should grant certiorari to resolve a conflict in the Circuits as to whether a disparate impact claim is viable in an ADEA sub-group case.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted in all respects.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JULY 11, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 175 — August Term, 1996

(Argued: November 27, 1996 Decided: July 11, 1997)

Docket No. 96-7110

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—v.—

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Defendants-Appellees.

Before:

WALKER and LEVAL, *Circuit Judges,*
and STANTON, *District Judge.*[1]

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1. The Honorable Louis L. Stanton, United States District Judge for the Southern District of New York, sitting by designation.

Appendix A

Appeal from a judgment of the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge).* The district court granted summary judgment to defendant Delta Airlines, Inc. upon a finding that Delta did not practice age discrimination in its hiring of pilots when it took over shuttle routes from Pan American World Airways, Inc. The plaintiffs, all of whom were Pan Am pilots aged 55 and older at the time of the shuttle takeover, claim they were not hired because of their age.

Affirmed.

LEONARD N. FLAMM, New York, N.Y., (Norman Mednick and Maria D. Beckman, New York, N.Y., On the Brief), for *Appellants.*

WILLIAM H. BOICE, Atlanta, GA., (Stephen E. Hudson, Kilpatrick & Cody, Atlanta, GA., On the Brief; Stuart H. Bompey and Ira G. Rosenstein, Orrick, Herrington & Sutcliffe, New York, N.Y., Of Counsel), for *Appellees.*

PER CURIAM:

Plaintiffs, who are former pilots of Pan Am World Airways, Inc., appeal the summary dismissal of their claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"). The pilots contend that when the defendant Delta Air Lines, Inc. took over the faltering Pan Am shuttle Delta's hiring selection of Pan Am pilots was age biased. The United States District Court for the Eastern District of New York (Jack

B. Weinstein, *Judge)* granted summary judgment to defendants, finding that, after two years of discovery, there was no showing that Delta practiced age discrimination.[2]

The plaintiffs were all aged 55 and older at the time of the shuttle transfer. They allege that, in hiring shuttle pilots from Pan Am, Delta used a seniority system that disadvantaged senior pilots and that it deliberately withheld seniority information in order to discourage older pilots from qualifying for the shuttle jobs. Plaintiffs also claim that Judge Weinstein should have recused himself from their case because his previous decisions evidence age bias. We find no basis for recusal and agree with Judge Weinstein that the record before the district court raised no genuine factual issue of discrimination on Delta's part. We therefore affirm.

The essential underlying facts are as follows. In early 1991, Pan Am filed for bankruptcy. On July 27, 1991, Pan Am and Delta entered into an Asset Purchase Agreement ("APA"), through which Pan Am sold to Delta certain assets, including Pan Am's shuttle routes and the Airbus A-310 and Boeing 727 aircraft used on those routes. Under the terms of the APA, Delta promised to hire at least 700 Pan Am pilots to fly the shuttle routes. The APA provided that those pilots "must be fully trained and currently qualified in the Boeing 727 or Airbus A-310 categories . . . as of November 1, 1991" and would be hired in "seniority order by category." The APA further stipulated that

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2. The pilots raise no substantive claim against the other named defendant, Air Line Pilots Association (the pilots' union). According to the complaint, the union was joined as a party because of its "interest in the subject matter of this action, and in order that complete and effective disposition of the Plaintiff's claims can be made herein." *See* Fed. R. Civ. P. 19(a).

"[a]ny training of [Pan Am's] pilots required to make them fully trained and currently qualified in the applicable Airbus A-310 or Boeing 727 categories . . . shall be the responsibility of and undertaken at the expense of [Pan Am]." The Bankruptcy Court approved the APA in August 1991. *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (S.D.N.Y. 1994). Delta ultimately hired 774 former Pan Am pilots.

None of the plaintiff-pilots were qualified to fly the shuttle planes as of November 1991. They allege, however, that their lack of qualification was the result of the discriminatory way the shuttle jobs, and the necessary training, were offered. They allege that the seniority system adopted under the APA for the shuttle jobs and the manner in which information about that system was provided were calculated to discourage older pilots from switching from Pan Am to Delta. Delta explains that, as required by the APA, Pan Am pilots who were qualified to fly the A-310s and 727s as of November 1 were hired in the order of their overall seniority as ranked by Pan Am. Plaintiffs, however, allege that while the seniority system used may be clear now, at the time Pan Am pilots had to decide whether to retrain, Delta deliberately fostered confusion about how seniority would be calculated under the APA in order to discourage senior, older, Pan Am pilots from transferring to Delta.

According to plaintiffs, pilots were asked to make snap decisions that would affect their futures without information about how the choice to move to Delta would affect salary, seniority status, and retirement benefits, and with the understanding that acceptance of the training would involve forfeiture of the chance for continued employment with Pan Am. There is no evidence that younger pilots were offered training in any more congenial manner. Plaintiffs argue, however, that

because older, more senior, pilots had more to lose, they would be unlikely to make the jump, which was the effect Delta hoped to produce.

Plaintiffs maintain that Pan Am pilots should have been hired according to "simple system-wide seniority," the method advocated by the pilots' union after the APA was signed. Under this system, pilots would have been eligible for hiring strictly on the basis of their total seniority with Pan Am without regard to their qualification to fly the Airbus and 727 airplanes Delta was taking over. According to plaintiffs, hiring on an overall seniority basis would have been a rational decision, because pilots are routinely retrained on different aircraft and the training needed by most of the senior pilots was minimal, since the planes they flew were larger and more complicated than the shuttle planes.

Under the ADEA, once plaintiffs have satisfied the minimal requirements of the prima facie case and the defendant has articulated a non-discriminatory reason for the challenged action, plaintiffs must prove the real reason for the challenged action was age. *See Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994). To defeat a properly supported motion for summary judgment in an age discrimination case, plaintiffs must "show that there is a material issue of fact as to whether (1) the employer's asserted reason for [the challenged action] is false or unworthy of belief *and* (2) more likely than not the employee's age was the real reason." *Id.* at 108-09.

Plaintiffs contend that Delta's real reason for rejecting overall seniority and instituting the seniority plan provided by the APA (and the reason plaintiffs allegedly did not receive clear information about that plan) was age bias. Delta, however, has

offered unrebutted age-neutral explanations for its decision to reject the "system-wide seniority transfer" proposal promoted by plaintiffs. First, Delta asserts that it was reasonably concerned to hire a pilot force capable of immediately staffing the shuttle at the point that Delta took it over, which naturally entailed hiring pilots who were currently qualified to fly those planes. Moreover, Delta asserts, and plaintiffs have not effectively contradicted, that the use of system-wide seniority, irrespective of qualification for the equipment, would have required Delta to hire more pilots than it needed.

Plaintiffs seek to rebut Delta's age-neutral proofs by pointing to a variety of unconnected fragments of evidence in which Delta personnel might be understood to be making reference to age. None of the statements cited by plaintiffs reflect any age-based stereotype or belief that older pilots are less competent than younger ones. Instead, these references appear in the context of efficiency concerns raised by the Federal Aviation Administration's rule that commercial pilots cannot fly passenger jets past age 60. *See* 14 C.F.R. § 121.383(c).

At most, some of the statements suggest a concern about the economics of hiring pilots who were approaching the mandatory retirement age. The evidence might support an inference that Delta was reluctant to hire pilots who would shortly be disqualified from piloting and might begin drawing pension benefits. Under *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12, 113 S. Ct. 1701, 1706-07 (1993), an employer's concern about the economic consequences of employment decisions does not constitute age discrimination under the ADEA, even though there may be a correlation with age. *Hazen* made clear that employment decisions driven by factors that are empirically intertwined with age are not discriminatory so

long as they are motivated by "some feature other than the employee's age." *Id.* at 609, 113 S. Ct. at 1705. Thus, decisions motivated by economic concerns do not violate the ADEA.

The concern expressed in the comments plaintiffs cite is the inefficiency and expense of hiring large numbers of pilots on the verge of mandatory retirement. *Hazen* left open the question whether an employment action based on an employee's retirement status might violate the ADEA if that retirement status was a direct function of age (rather than years of service). *Id.* at 613, 113 S. Ct. at 1707-08. Because the Pan Am pilots were subject to a mandatory retirement *age,* their case is arguably beyond *Hazen's* narrow holding. We conclude, nonetheless, that Delta's concerns about the economics of hiring pilots approaching mandatory retirement were not discriminatory within the meaning of the ADEA, even though their retirement was required by law at a specified age, and not determined by years of service or some other yardstick. "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* at 610, 113 S. Ct. at 1706. To the extent the comments cited by plaintiffs implicate age at all, they express considerations of the business effects of the federally mandated retirement age, not assumptions about employees' abilities based on their age. On the reasoning of *Hazen,* considering and acting on such factors is not age discrimination.

Plaintiffs also claim that Delta's hiring plan was discriminatory, even without ageist intent, because of its "disparate impact" on Pan Am pilots aged 55 and over. Although the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA, *Hazen,* 507 U.S.

at 610, 113 S. Ct. at 1701, in our circuit, we have recognized such an action. *District Council 37 v. New York City Dep't of Parks and Recreation*, __ F.3d __, 1997 WL 245189 at *4 (2d Cir. May 14, 1997), citing *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 115 (2d Cir. 1992). We have held, however, that it must allege a disparate impact on the entire protected group, *i.e.*, workers aged 40 and over. *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372-73 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026, 110 S. Ct. 1470 (1990). Plaintiffs acknowledge that 94.1 % of the pilots Delta hired were aged 40 and older and that the hiring scheme had no negative impact on the overall group of Pan Am pilots aged 40 and older. Under *Lowe*, then, plaintiffs' disparate impact claim cannot survive.

Plaintiffs' other asserted bases for finding age discrimination are strained and without merit. Judge Weinstein was correct to dismiss them on the motion for summary judgment. *See Woroski*, 31 F.3d at 109-10, *("[S]ome* evidence is not sufficient to withstand a properly supported motion for summary judgment; a plaintiff opposing such a motion must produce sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not the employee's age was the real reason" for the challenged action.). Plaintiffs are correct that it is *theoretically* possible that in negotiating the APA, Delta could have exacted from Pan Am a promise to train and send only younger pilots in preference to older ones, giving rise to an ADEA claim against Delta. To the extent that the district judge relied upon the bankruptcy court's approval of the contract as a reason to exonerate Delta of any discrimination liability, such reliance appears misplaced. Nevertheless plaintiffs have brought insufficient evidence to sustain a reasonable inference of

discrimination on Delta's part in its negotiation of the contract's terms.

Finally, plaintiffs argue that Judge Weinstein should have recused himself because his statements while trying other ADEA cases indicate that he harbors age bias. The Supreme Court has cautioned that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, (1994). In any event, we find no indication in plaintiffs' submissions of any bias on Judge Weinstein's part.

In summary, we agree with the core of the district court's holding that plaintiffs have produced insufficient evidence to give rise to a material issue of fact regarding age discrimination. The judgment is affirmed.

APPENDIX B — EXCERPTED TRANSCRIPT OF MOTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 13, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 93-1666, 92-1049, 93-853

United States Courthouse
Brooklyn, New York

DAVID CRILEY, WALTER DUKE, JR., EDWARD SPELLACY JR., et al,

Plaintiffs,

-against-

DELTA AIRLINES, ALPHA, et al.,

Defendants.

December 13, 1995
11:00 o'clock a.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[22] . . . evidence of age discrimination, and

Lastly, when pilots did request information from Delta to assist them in whether or not to make training decisions, Delta said we don't have, which in fact that they did. They knew what was going on.

THE COURT: All right, the motion for summary judgment to dismiss against all defendants is granted. I think they are now entitled to cost and disbursements, since they had additional unnecessary expenses in these proceedings. The costs and disbursements on the motion and in the action. Submit a judgment and let's take this up on appeal and let's get it set one way or the other. I can't do anything for you. I'm convinced there is nothing to this case whatsoever against Delta.

MR. BOICE: Thank you, your Honor.

THE COURT: Next case.

Try to agree on the terms and give me the judgment today or tomorrow.

THE CLERK: Civil cause for motion, Duke versus Alpha.

MR. ABRAMS: At our conference in October your Honor granted the motion to dismissal the claims against defendant Alpha in these cases, except the duty of fair representation.

THE COURT: As I understood from some of the papers, and I do not want to break train of thought, the individual . . .

* * *

APPENDIX C — EXCERPTED TRANSCRIPT OF CIVIL CAUSE FOR MOTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED OCTOBER 26, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-93-1666
(JBW)

United States Courthouse
Brooklyn, New York

DAVID CRILEY, et al., :

Plaintiffs,

-against-

DELTA AIRLINES, et al.,

Defendant.

October 26, 1995
11:00 o'clock a.m.

TRANSCRIPT OF CIVIL CAUSE FOR MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

Appendix C

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Proceedings recorded by mechanical stenography, transcript [2] produced by CAT.

THE CLERK: Civil cause for motion, David Criley et al versus Delta Airlines, et al.

Appendix C

Counsel, note your appearance, please.

MR. BOICE: Bill Boice for Delta Airlines. With me is Steve Hudson with the same firm, for Delta.

MR. CIANTRA: Thomas Ciantra for the Airline Pilots Association which is a defendant pursuant to Rule 19 in this case.

MR. FLAMM: Plaintiffs' attorneys: Leonard Flamm, appearing with Norman Mednick.

THE COURT: Who are these other people in the courtroom?

MR. FLAMM: Persons in the courtroom, Ed Spellacy and Ed Wass, members of the plaintiffs.

THE COURT: Go ahead.

MR. BOICE: Bill Boice. I am representing Defendant Delta Airlines in this case.

We have pending before the Court a motion for summary judgment dismissing the claims of the named plaintiffs in this action. The Court, I think, is familiar with the basic transaction that is involved in this lawsuit, but if I may hit a couple of the highlights to refresh the recollection.

This case arises out of Delta's acquisition of certain assets of Pan Am in 1991. Specifically, Delta . . .

Appendix C

* * *

[47] MR. BOICE: There also is a motion to certify this as a Rule 23 class for state law claims. Again, that would follow these individual named plaintiffs. We have to get to the point that there are claims here that survive, and then we look to see whether people are similarly situated under both cases.

THE COURT: Yes.

All right.

The motion to dismiss is granted.

The contract involved was approved by the bankruptcy Court and was enforceable pursuant to its terms. This was essentially a turn-key operation. Pan Am turned over aircraft and pilots authorized and trained to operate those aircraft. There's no showing of any intention to discriminate on the basis of age.

This is a very sad case for those fine pilots who did not obtain jobs with Delta, particularly since Pan Am was not able to continue in operation and provide the jobs that they were well trained and capable of doing for Pan Am.

The issue is raised that this hearing by the Court were for its own understanding of the total situation. The affidavits that the plaintiffs wish to submit are irrelevant. The motion for summary judgment, however, the Court will be happy to receive them for purposes of appeal. You have ten days to supplement the record. Ten days to supplement the [48] record, and the defendants will have five days thereafter.

MR. FLAMM: That's on the issue we discussed?

THE COURT: Whatever issue you wish.

MR. FLAMM: Thank you.

THE COURT: Including that, and the defendants will have five days thereafter to supplement.

The defendants will submit a judgment and order of dismissal five days after it submits its affidavits.

You will show it to counsel for the defendants so they can object as to form and submit a counter order.

Do you want to amend the complaint?

MR. FLAMM: Yes, your Honor.

THE COURT: You want time to amend?

MR. FLAMM: We did move to.

THE COURT: That's granted.

Do you wish a further amendment?

MR. FLAMM: I appreciate the offer. If you would grant that amendment for the purposes of the record.

THE COURT: Yes, that's granted, but then there won't be any further amendment. We can bring the case to a close.

As far as the Allied Pilots Association, it is in a position derivatively, and if the action is dismissed against Delta, there's no point at all in keeping the Airline Pilots Association in the case.

I will not grant costs and disbursements so it really . . .

* * *

APPENDIX D — RELEVANT STATUTES AND REGULATIONS

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 29 U.S.C. § 621, *et seq.*

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that —

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub. L. 90-202, § 2, Dec. 15, 1967, 81 Stat. 602.)

* * *

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his

employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization —

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

* * *

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

* * *

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years

of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(Pub.L. 90-202, § 12, Dec. 15, 1967, 81 Stat. 607; Pub.L. 95-256, § 3(a), (b)(3), Apr. 6, 1978, 92 Stat. 189, 190; 1978 Reorg.Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub.L. 98-459, Title VIII, § 802(c)(1), Oct. 9, 1984, 98 Stat. 1792.)

Appendix D

14 C.F.R. § 121.383(c)

CODE OF FEDERAL REGULATIONS
TITLE 14 — AERONAUTICS AND SPACE
CHAPTER I — FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION SUBCHAPTER G — AIR CARRIERS AND OPERATORS FOR COMPENSATION OR HIRE: CERTIFICATION AND OPERATIONS
PART 121 — OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS
SUBPART M — AIRMAN AND CREWMEMBER REQUIREMENTS
Current through September 16, 1997; 62 FR 48498

§ 121.383 Airman: Limitations on use of services.

(a) No certificate holder may use any person as an airman nor may any person serve as an airman unless that person —

(1) Holds an appropriate current airman certificate issued by the FAA;

(2) Has any required appropriate current airman and medical certificates in his possession while engaged in operations under this part; and

(3) Is otherwise qualified for the operation for which he is to be used.

(b) Each airman covered by paragraph

(a) (2) of this section shall present either or both certificates for inspection upon the request of the Administrator.

(c) No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

[Doc. No. 6258, 29 FR 19212, Dec. 31, 1964, as amended by Amdt. 121-144, 43 FR 22646, May 25, 1978]

29 C.F.R. § 1625.7(D)

CODE OF FEDERAL REGULATIONS
TITLE 29 — LABOR
SUBTITLE B — REGULATIONS RELATING TO LABOR
CHAPTER XIV — EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1625 — AGE DISCRIMINATION IN EMPLOYMENT ACT
SUBPART A — INTERPRETATIONS
Current through September 16, 1997; 62 FR 48498

§ 1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f) (1) of the Act provides that * * * it shall not be unlawful for an employer, employment agency, or labor

organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plants which qualify for the section 4(f) (2) exception to the Act.

(2)

Supreme Court, U.S.
FILED
NOV 10 1997
CLERK

No. 97-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Petitioners,

vs.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT DELTA AIR LINES, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Second Circuit correctly affirm the district court's judgment dismissing Petitioners' "failure to hire" age discrimination claims against Respondent Delta Air Lines, Inc. ("Delta") under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.*, where the Asset Purchase Agreement (the "APA") between Delta and Pan American World Airways, Inc. ("Pan Am") specified that Delta would hire only those Pan Am pilots who were "fully trained and currently qualified" on the aircraft that Delta was acquiring from Pan Am, and it is undisputed that the Pan Am pilots Delta did hire were fully trained and currently qualified on those aircraft but Petitioners were not?

2. Did the Court of Appeals correctly affirm the district court's judgment dismissing Petitioners' "failure to train" age discrimination claims where the APA specifically provided that any training of Pan Am pilots at Pan Am was solely Pan Am's responsibility, the APA did not give Delta the power to control how Pan Am selected its pilots for training, and each Petitioner was in fact offered training by Pan Am to become qualified for employment by Delta on the same terms and under the same conditions as was offered to similarly situated pilots at Pan Am?

3. Did the Court of Appeals correctly affirm the district court's judgment dismissing Petitioners' disparate impact age discrimination claims where it is undisputed that Delta offered employment to the Pan Am pilots who were "fully trained and currently qualified" on the acquired aircraft with the result that 94.1% of the former Pan Am pilots hired by Delta were age 40 or older, 68.3% of the former Pan Am pilots hired by Delta were age 50 or older, and only 5.9% of the former Pan Am pilots hired by Delta were under age 40, and Petitioners

offered no evidence that any facially neutral employment policy had an adverse or disparate impact on the relevant statistical population?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

TABLE OF AUTHORITIES ..... (iv)

STATEMENT OF THE CASE 1

Factual Background 1

The District Court's Decision 6

The Second Circuit's Decision 7

REASONS FOR DENYING THE WRIT 9

I. The Second Circuit's Decision Was Correct 9

A. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' "Failure to Hire" Age Discrimination Claims 9

1. Petitioners Failed to Establish a Prima Facie Case 10

2. Petitioners Offered No Evidence That the Legitimate, Non-Discriminatory Reason Articulated by Delta for Not Hiring Them Was Pretextual 12

B. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' "Failure to Train" Age Discrimination Claims 16

C. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' Age Discrimination Claims Under a Disparate Impact Theory 18

II. No Issue Worthy of the Court's Certiorari Review is Presented by the Petition 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases	Page
Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990)	10
Criley v. Delta Air Lines, Inc., 119 F.3d 102 (2d Cir. 1997) (*per curiam*)	*passim*
District Council 37 v. New York City Dep't of Parks & Recreation, 113 F.3d 347 (2d Cir. 1997)	18
EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984)	21
EEOC v. Wyoming, 460 U.S. 226	15-16
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)	22
Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949)	22
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	*passim*
Jackson v. Harvard Univ., 900 F.2d 464 (1st Cir), *cert. denied*, 498 U.S. 848 (1990)	10
Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157 (2d Cir. 1991), *cert denied*, 502 U.S. 880 (1991)	11
Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990)	8, 19
Maresco v. Evans Chemetics, Div. of W. R. Grace & Co., 964 F.2d 106 (2d Cir. 1992)	18-19
NCAA v. Board of Regents, 468 U.S. 85 (1984)	22
O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307 (1996)	10, 13-14, 21
Pan Am Corp. v. Delta Air Lines, Inc. 175 B.R. 438 (S.D.N.Y. 1994)	2
Rogers v. Lodge, 458 U.S. 613 (1982)	22
St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993	10, 12
Taggart v. Time Inc., 924 F.2d 43 (2d Cir. 1991)	10

Cases (cont'd) **Page**

Teamsters v. United States, 431 U.S. 324 (1977) 10

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 12

Texas v. Mead, 465 U.S. 1042 (1984) 22

Tyler v. Bethlehem Steep Corp., 958 F.2d 1176 (2d Cir), *cert. denied*, 506 U.S. 826 (1992) 10

United States v. Johnston, 268 U.S. 220 (1925) 22

Statutes

29 U.S.C. § 621, *et seq.* ..... *passim*

New York State Human Rights Law, Exec. Law § 296(1) (McKinney's 1993) 6

Rules

14 C.F.R. § 121.383(c) 7

Fed. R. Civ. P. 19 6

Sup. Ct. R. 10 21

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs and appellants below, were formerly employed as pilots by Pan Am. They allege that Respondent Delta, defendant and appellee below, discriminatorily denied employment to them because of their ages. They claim that Delta should have hired them instead of some of the 774 former Pan Am pilots that it did hire (median age 52) when it acquired certain Pan Am assets in 1991. The district court judge dismissed Petitioners' age discrimination claims, and the Court of Appeals for the Second Circuit affirmed. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2d Cir. 1997) (*per curiam*).

The Court should deny Petitioners' request for a writ of certiorari not merely because the Second Circuit's decision was correct in all respects, but most importantly because no legal issue worthy of the Court's certiorari review is presented by the Petition. Indeed, the first three legal issues identified in the Petition as "Questions Presented" are not in fact presented by this case, although they would not justify this Court's certiorari review even if they were presented. As to the fourth and final issue, which Petitioners acknowledge "this Court may wish to decline to address as being premature," Pet. 4, it is likewise not properly presented by the claims of these Petitioners.

STATEMENT OF THE CASE

Factual Background

Plaintiffs' two-paragraph description of the facts (Pet. 2-3) is incomplete and inaccurate, and the unsupported factual assertions in the remainder of their Petition are a gross distortion of the record evidence. The entire Petition is based on an unsupported and erroneous factual predicate. A complete

statement of the undisputed facts relevant to the Petition is set forth below.

In early 1991, Pan Am filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. In July 1991, Pan Am and Delta entered into an Asset Purchase Agreement, dated as of July 27, 1991, pursuant to which Delta agreed to acquire certain equipment and routes from Pan Am. The equipment that Delta agreed to acquire pursuant to the APA included certain Airbus A-310 and Boeing 727 commercial aircraft. APA, §§ 2.1(b) and 2.2(b). The APA specified that there would be an interim closing on or about September 1, 1991, for Delta's purchase of the Pan Am Shuttle, and a final closing on November 1, 1991, for Delta's purchase of the remainder of the assets that it had agreed to acquire. On August 12, 1991, the APA was approved by the United States Bankruptcy Court for the Southern District of New York. *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (S.D.N.Y. 1994).

The APA provided that Delta would hire "at least" 700 Pan Am pilots to fly the A-310 and B-727 aircraft that it had agreed to acquire:

> [Delta] will offer employment to at least seven hundred (700) of [Pan Am's] pilots, ***who must be fully trained and currently qualified*** in the Boeing 727 or Airbus A-310 categories . . . ***as of November 1, 1991*** . . . and who must meet all of [Delta's] standards and requirements for pilots . . . in order to be eligible for consideration by [Delta] hereunder. . . . ***[Pan Am's] pilots who meet such requirements will be offered employment with [Delta] in seniority order by category.***

APA, § 5.9(h)(i) (emphasis added): 2a.

The APA provided that Pan Am would be solely responsible for any training that it chose to offer to its own pilots who were flying other aircraft so that they could become "fully trained and currently qualified" on the aircraft that Delta was acquiring:

> Any training of [Pan Am's] pilots required to make them fully trained and currently qualified in the applicable Airbus A-310 or Boeing 727 categories as described in subsection 5.9(h)(i) hereof shall be the responsibility of and undertaken at the expense of [Pan Am].

APA, § 5.9(h)(iv): 3a. Contary to Petitioners' unsupported assertion, Delta did not "authorize[] Pan Am to . . . interview, screen and retrain the Pan Am pilots for potential hire or re-hire by Delta." Pet. 2.

The priority in which Pan Am pilots were considered eligible to be hired by Delta pursuant to the APA was dependent upon two determinations: (1) identifying which Pan Am pilots were or would become "fully trained and currently qualified" on the A-310 or B-727 aircraft by the closing dates, and (2) ranking those pilots "in seniority order by category" for the two aircraft as of the relevant dates. Both of these determinations were made by Pan Am, not by Delta.

At various times between mid-August and late October 1991, Pan Am supplied Delta with lists of its pilots who were or would become "fully trained and currently qualified" on the A-310 and B-727 aircraft by the closing dates. Pan Am ranked the pilots on the lists on the basis of their Pan Am seniority. There is no evidence to support Petitioners' assertion that Delta "design[ed] and caus[ed] Pan Am to implement a series of pilot selection procedures which minimized the number of the oldest pilots [that] Delta would have to hire." Pet. 2.

Delta reviewed the lists of pilots received from Pan Am, contacted each pilot, and determined who was interested in employment with Delta. Those pilots who were interested were scheduled for interviews. Delta filled its staffing requirements for the A-310 aircraft with the most senior fully trained and currently qualified pilots for the respective positions on that aircraft based on the lists supplied by Pan Am. Likewise, Delta filled its staffing requirements for the B-727 aircraft with the most senior fully trained and currently qualified pilots for the respective positions on that aircraft based on the lists supplied by Pan Am. Delta eventually hired 774 former Pan Am pilots — 74 more than it was contractually obligated to hire.

Thus, being placed by Pan Am on a list of "fully trained and currently qualified" pilots on the A-310 or B-727 and having sufficient Pan Am seniority were prerequisites for consideration for employment at Delta. None of the Petitioners, however, was "fully trained and currently qualified" on either the A-310 or the B-727 as of the final closing date. Delta did not hire or even contact Petitioners because their names did not appear on the lists of fully trained and currently qualified A-310 or B-727 pilots supplied to Delta by Pan Am.

Although none of the Petitioners was "fully trained and currently qualified" on either the A-310 or the B-727, in late August 1991 Pan Am offered to train each of the Petitioners on the B-727 so that they could become eligible for employment by Delta on that aircraft by November 1, 1991. Each of the Petitioners declined Pan Am's offer of training. If Petitioners had accepted Pan Am's offers of training and successfully completed the training, they would have been included on the lists of fully trained and currently qualified B-727 pilots supplied to Delta by Pan Am.

Petitioners declined Pan Am's offers of training because they were Captains on the B-747 aircraft at Pan Am, which was a larger and higher-paying aircraft than the B-727. At the time, it was anticipated that Pan Am would continue in business and would use the B-747 aircraft in its operations. Petitioners elected to remain at Pan Am flying the B-747 rather than accept Pan Am's offer of training on the B-727 to become eligible for hire by Delta as B-727 pilots. Other Pan Am pilots of Petitioners' ages accepted Pan Am's offers, were trained in place of Petitioners, and were ultimately hired by Delta.

Despite Petitioners' allegations of age bias, Delta hired a very senior group of Pan Am pilots. 728 of the 774 (or 94.1%) of the former Pan Am pilots hired by Delta were age 40 or older. 529 of the 774 (or 68.3%) of the former Pan Am pilots hired by Delta were age 50 or older. Only 46 of the 774 (or 5.9%) of the former Pan Am pilots hired by Delta were under age 40. The mean age of the group hired by Delta from Pan Am was 50, and the median age was 52.

Pan Am ceased its airline operations in December 1991. At that point, Petitioners realized that they had made a mistake in electing to remain at Pan Am as B-747 Captains. They filed charges of discrimination against Delta with the Equal Employment Opportunity Commission (the "EEOC"). That agency investigated the allegations of discrimination but rejected them as follows:

> The evidence gathered during the investigation does not disclose that [Delta] intended to discriminate against [Petitioner] individually, nor against the most senior pilots as a group, and the ages of the pilots actually hired does not lead to a presumption that there was an intent to exclude the oldest pilots or the most senior pilots.

> Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

6a.

The District Court's Decision

Petitioners filed this action in the United States District Court for the Eastern District of New York in April 1993. They asserted age discrimination claims against Delta[1] under both the federal Age Discrimination in Employment Act of 1967 (the "ADEA"), as amended, 29 U.S.C. § 621, *et seq.*, and the New York State Human Rights Law, Exec. Law § 296(1) (McKinney's 1993). After two years of discovery, the district court judge, The Honorable Jack B. Weinstein, granted Delta's motion for summary judgment and dismissed Petitioners' complaint in an unpublished order. The district court judge concluded:

> This was essentially a turn-key operation. Pan Am turned over aircraft and pilots authorized and trained to operate those aircraft. There's no showing of any intention to discriminate on the basis of age.

Petitioners' Appendix, 17a. Petitioners filed a motion for reconsideration but the district court judge adhered to his earlier ruling.

---

[1] Petitioners asserted no substantive claims against the other respondent, the Air Line Pilots Association ("ALPA"), which was also a defendant and appellee below. ALPA was joined as a defendant, pursuant to Fed. R. Civ. P. 19, because of its "interest in the subject matter of this action, and in order that complete and effective disposition of the [Petitioners'] claims can be made herein."

The Second Circuit's Decision

The Court of Appeals for the Second Circuit affirmed the district court's judgment dismissing Petitioners' age discrimination claims. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2d Cir. 1997) (*per curiam*). As to Petitioners' disparate treatment claims, the Second Circuit held that "the record before the district court raised no genuine factual issue of discrimination on Delta's part." *Id.* at 103. The Second Circuit found that Delta had "offered unrebutted age-neutral explanations" for not hiring Petitioners: They were not identified on Pan Am's list of "fully trained and currently qualified" pilots on the aircraft Delta was acquiring. *Id.* at 104-05.

In rejecting Petitioners' pretext evidence concerning the legitimate, non-discriminatory reason articulated by Delta for not hiring them, the Second Circuit referred to "a variety of unconnected fragments of evidence in which Delta personnel might be understood to be making reference to age." *Id.* at 105. The evidence consisted of comments in notes taken during the exploratory stage of the Delta-Pan Am transaction, which merely recorded accurate information about the ages of the Pan Am pilot work force. The comments had nothing to do with Petitioners, why they were not hired by Delta, or any issue relevant to this case. Referring to these comments, the Second Circuit stated, in *dicta*, that "[n]one of the statements cited by [Petitioners] reflect any age-based stereotype or belief that older pilots are less competent than younger ones." *Id.* at 105. Although unnecessary to its decision, because the evidence did not relate to Delta's legitimate, non-discriminatory reason, the Second Circuit observed that "[t]o the extent the comments cited by [Petitioners] implicate age at all, they express considerations of the business effects of the federally mandated retirement age [of 60 for commercial airline pilots under 14 C.F.R. § 121.383(c)], not assump-

tions about employees' abilities based on their age." 119 F.3d at 105. While the comments might indicate some concern about the cost of hiring those pilots who were close to retirement, there was no showing that this was a factor considered or acted upon by Delta, as Delta later agreed in the APA to hire, in seniority order (and regardless of age or proximity to retirement), those Pan Am pilots who were "fully trained and currently qualified" on the acquired aircraft by the closing dates. The Second Circuit nevertheless stated, relying on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that "employment decisions driven by factors that are empirically intertwined with age are not discriminatory so long as they are motivated by 'some feature other than the employee's age.'" 119 F.3d at 105 (quoting *Hazen*, 507 U.S. at 609).

Contrary to Petitioners' assertions, the Second Circuit neither held nor implied that "the evidence adduced by Petitioners showed that Delta declined to hire pilots over age 55," Pet. 12, or that "Petitioners, in the Second Circuit's view, were refused employment by Delta because [of] their respective ages, *per se*." *Id.* at 13. These assertions find no support in the Second Circuit's opinion.

As to Petitioners' disparate impact claim, the Second Circuit acknowledged that "the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA." 119 F.3d at 105 (citing *Hazen*, 507 U.S. at 610). The court recognized that prior Second Circuit decisions had permitted a disparate impact theory of liability under the ADEA but had limited it to claims "alleg[ing] a disparate impact on the entire protected group, *i.e.*, workers aged 40 and over." 119 F.3d at 105 (citing *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372-73 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990)). The Second Circuit concluded that since Petitioners "acknowledge that 94.1% of the pilots Delta

hired were aged 40 and older and that the hiring scheme had no negative impact on the overall group of Pan Am pilots aged 40 and older[,] . . . [their] disparate impact claim cannot survive" under existing Second Circuit precedent. 119 F.3d at 105.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Decision Was Correct.

The ADEA prohibits discrimination with respect to the employment of workers age 40 or older on the basis of age. 29 U.S.C. §§ 621, 623, 631 (1994). Petitioners' request for a writ of certiorari is based entirely on the erroneous premise that the Second Circuit affirmed the dismissal of Petitioners' age discrimination claims despite finding that they had suffered "an adverse employment action" because of their ages. Pet. i, 12-13. To the contrary, the Second Circuit affirmed the district court's judgment precisely because it concluded the exact opposite. Here, the EEOC, the district court, and the Second Circuit have all concluded that Petitioners have failed to come forward with evidence that Delta discriminated against them in any respect because of their ages.

A. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' "Failure to Hire" Age Discrimination Claims.

In a "failure to hire" discrimination case, each plaintiff bears the burden of proving that the adverse employment decision about which he complains was a result of intentional discrimination. In this case, Petitioners had no direct evidence[2] that

[2] Direct evidence of discrimination is evidence which, if believed, would prove without inference or presumption that the affected employee was

any action by Delta was motivated by their ages. The establishment of a discriminatory motive was thus governed by the allocations of burdens and order of proof most recently expressed in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

Petitioners cannot establish a *prima facie* case of age discrimination because they could not show that they were qualified for the pilot positions that Delta offered to the Pan Am pilots. Even if Petitioners had established a *prima facie* case, the Second Circuit correctly held that they offered no evidence that the legitimate, non-discriminatory reason articulated by Delta for not hiring them was pretextual.

1. Petitioners Failed to Establish a *Prima Facie* Case.

To establish a *prima facie* case of age discrimination in a "failure to hire" context, each Petitioner was required to show that (1) he belongs to the protected age group, (2) he applied for and was qualified for the position sought, (3) he was not hired despite his qualifications, and (4) the position was ultimately filled by a younger person. *Taggart v. Time Inc.*, 924 F.2d 43, 46 (2d Cir. 1991). In *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996), this Court held that a *prima facie* case under the ADEA "requires '*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . ..*'" *Id.* at 1310 (emphasis in opinion) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)).

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discriminated against. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990).

Petitioners could not even establish a *prima facie* case because they could not show that they were qualified for the pilot positions that Delta offered to the Pan Am pilots. It is undisputed that none of the Petitioners was fully trained and currently qualified on either the A-310 aircraft or the B-727 aircraft as of November 1, 1991. It is also undisputed that none of their names appeared on the lists of fully trained and currently qualified A-310 pilots or B-727 pilots supplied by Pan Am to Delta. It is further undisputed that only those Pan Am pilots whose names appeared on the lists of fully trained and currently qualified A-310 pilots or B-727 pilots supplied by Pan Am to Delta were eligible for hire by Delta.

Petitioners' inability to establish the "qualification" prong of the second element of their *prima facie* case required the dismissal of their "failure to hire" age discrimination claims, and neither the district court nor the Second Circuit needed to proceed any further in their analysis. *See Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 161-162 (2d Cir.1991) ("Having found that [the plaintiff] did not meet his initial burden of producing sufficient evidence to establish a *prima facie* case [of discrimination], the trial judge was under no obligation to proceed further . . . ."), *cert. denied*, 502 U.S. 880 (1991). In this case, the Second Circuit merely assumed that Petitioners had established a *prima facie* case, and proceeded to consider Delta's articulated, legitimate, nondiscriminatory reason for not hiring them. But the evidence is undisputed that Petitioners have not established, and cannot establish, a *prima facie* case of age discrimination against Delta.

2. Petitioners Offered No Evidence That the Legitimate, Non-Discriminatory Reason Articulated by Delta for Not Hiring Them Was Pretextual.

Even if each Petitioner had established a *prima facie* case, such proof merely would have created a rebuttable presumption of discrimination that Delta could dispel by articulating a legitimate, non-discriminatory reason for its action. *Hicks*, 509 U.S. at 506. In this case, the Second Circuit correctly held that Delta had dispelled any presumption that might have been created by a *prima facie* case by its articulated, legitimate, non-discriminatory reason for not hiring Petitioners: They were not identified on Pan Am's lists of fully trained and currently qualified pilots on the aircraft that Delta was acquiring. 119 F.3d at 104-05.

This legitimate, non-discriminatory explanation for Delta's failure to hire Petitioners would have destroyed any inference of discrimination that might have been created if Petitioners had been able to establish a *prima facie* case. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). Once a defendant articulates a legitimate, non-discriminatory reason for its action, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253. *Hicks* explained that the articulated "reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 509 U.S. at 515-16 (emphasis in opinion) (quoting *Burdine*, 450 U.S. at 253).

With regard to each Petitioners' first burden, there is *no* evidence that the reason Delta has articulated for not hiring

him is false. Indeed, it is undisputed, by Petitioners' own admissions, that they were not fully trained and currently qualified on either the A-310 or the B-727 as of November 1, 1991. It is also undisputed that their names did not appear on the lists of fully trained and currently qualified pilots that Pan Am sent to Delta. Likewise, it is undisputed that their names had to be on those lists to be eligible for hire by Delta. The Second Circuit thus correctly concluded that "the record before the district court raised no genuine factual issue of discrimination on Delta's part." 119 F.3d at 103.

With regard to the second burden, there is *no* evidence that Delta was actually motivated not to hire Petitioners because of their ages. The "variety of unconnected fragments of evidence" referred to in the Second Circuit's opinion, *id.* at 105, and quoted by Petitioners, Pet. 2-3 n.3, had nothing to do with Petitioners or why they were not hired by Delta. None of these "unconnected fragments of evidence" were or reflected "ageist directives to Pan Am," Pet. 2, and, contrary to Petitioners' assertion, none of them "reveal[ed] a clear disinclination on Delta's part to having too large a number of the oldest Pan Am pilots join its job ranks." Id. at 3.

Any assertion that Delta did not hire Petitioners because of their ages or that Delta was biased against older pilots in general is refuted by Delta's agreement to offer employment in seniority order and the resulting statistics of the group Delta hired (discussed *supra*), which show very favorable treatment of older pilots. For example, 94.1% of the former Pan Am pilots hired by Delta were age 40 or older, and 68.3% were age 50 or older. Delta hired 145 Pan Am pilots who, like Petitioners, were 55 years of age or older. There is no significant difference between the median age of the 774 pilots hired by Delta (52) and the ages of the class (55 years and older) Petitioners seek to represent. In *O'Connor v. Consolidated Coin*

Caterers Corp., *supra*, this Court held unanimously that evidence of "the replacement of a 68 year-old by a 65 year-old" is "very thin evidence" of age discrimination, and that an inference of age discrimination "can not be drawn from the replacement of one worker with another worker insignificantly younger." 116 S.Ct. at 1310.

Petitioners misrepresent the Second Circuit's reliance on *Hazen* in dismissing Petitioners' arguments about the "unconnected fragments of evidence in which Delta personnel might be understood to be making reference to age." 119 F.3d at 105. Although this portion of the Second Circuit's opinion was completely unnecessary to its decision, because none of the "fragments of evidence" referred or related to Petitioners or why they were not hired by Delta, the Second Circuit observed, in *dicta*, that "[n]one of the statements cited by [Petitioners] reflect any age-based stereotype or belief that older pilots are less competent than younger ones." *Id.* "To the extent the comments cited by [Petitioners] implicate age at all," the Second Circuit observed, "they express considerations of the business effects of the federally mandated retirement age, not assumptions about employees' abilities based on their age." *Id.* Citing *Hazen*, the Second Circuit stated that "employment decisions driven by factors that are empirically intertwined with age are not discriminatory so long as they are motivated by 'some feature other than the employee's age.'" *Id.* (quoting *Hazen*, 507 U.S. at 609).

The "comments" referred to by the Second Circuit were found in notes taken during the exploratory stage of the Delta-Pan Am transaction, where accurate information about the ages of some of the Pan Am employees was recorded. The comments did not relate to Delta's later agreement to hire, in seniority order, Pan Am pilots who were "fully trained and currently qualified" on the acquired aircraft, or Pan Am's

training of its pilots to make them eligible for hire by Delta, or any other issue in this case. Therefore, the comments were completely irrelevant to Petitioners' claims against Delta. But the Second Circuit proceeded to the next step and found that the comments did not even indicate "age bias" generally, but merely an awareness of the ages of the Pan Am pilots. 119 F.3d at 105. Thus, the Second Circuit's observations cited by Petitioners — about whether acting on factors that are "empirically intertwined with age" is actionable under the ADEA — are clearly *dicta* since they were unnecessary to the decision in this case, and involved a purely hypothetical situation since there is no evidence of any employment decision based on concerns about increased costs, proximity to retirement age, or any factor that is "empirically intertwined with age." Indeed, the statistical evidence discussed above demonstrates that Delta's agreement to hire, in seniority order, those Pan Am pilots who were "fully trained and currently qualified" on the acquired aircraft by the closing dates included pilots of all ages, including large numbers of older Pan Am pilots who were very close to retirement age.

In any event, nothing in the Second Circuit's decision is in conflict with, or contrary to, *Hazen*. *Hazen* considered "the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age." 507 U.S. at 608. This Court held, unanimously, that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609. The Court explained:

> It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. As we explained in *EEOC v. Wyoming*,

> 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

Id. at 610. The Court concluded that "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* at 611.

B. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' "Failure to Train" Age Discrimination Claims.

Faced with the undisputed facts in this case, Petitioners tacitly conceded below that they had failed to establish a *prima facie* case of age discrimination against Delta directly for failing to hire them. In their brief to the Second Circuit, they accused Delta of "mischaracteriz[ing] the instant case as one involving a 'failure to hire.' " 8a. Instead, according to Petitioners' brief to the Second Circuit, "the age discrimination occurred before the hiring took place" and was Pan Am's failure to train them so that they could become eligible to be hired by Delta. *Id.* (emphasis in original).

Although the Second Circuit did not directly address Petitioners' "failure to train" age discrimination claims, it implicitly — and correctly — affirmed the district court's dismissal of those claims. Pan Am was not Delta's "agent," and the APA did not appoint Pan Am to act as Delta's agent with regard to any retraining done at Pan Am of Pan Am pilots wanting to become eligible for employment with Delta. Nothing in

that agreement gave Delta the power to control whether Pan Am offered any training to its own pilots or how Pan Am selected its pilots for training. As quoted above, whether Pan Am offered or provided training so that non-qualified Pan Am pilots could become "fully trained and currently qualified" on the acquired aircraft by the closing dates was solely within the discretion and control of Pan Am. APA, § 5.9(h)(iv): 3a. Petitioners offered no evidence that Delta controlled how Pan Am selected its own pilots for training so that they could become "fully trained and currently qualified" on the acquired aircraft by the closing dates. Petitioners have not cited any legal authority holding that Delta could be held liable for any "age discrimination" of Pan Am under the facts of this case.

Petitioners not only offered no evidence that Delta controlled how Pan Am selected its own pilots for training, but it is undisputed that Pan Am did, in fact, offer training to each Petitioner so that he could become "fully trained and currently qualified" on the B-727 aircraft by November 1, 1991. Each elected to remain at Pan Am flying the B-747 rather than accept Pan Am's offer of training on the B-727 so that he could become eligible for hire by Delta as B-727 pilots. Petitioners' failure to accept Pan Am's offer of training should bar all of their claims as a matter of law. Petitioners' failure to receive the training they needed at Pan Am so that they could have become eligible to be hired by Delta was a result of their own decisions for which they are responsible, not because of anything that Delta did to them.

Finally, Petitioners argued in the district court and before the Second Circuit — but not in their Petition here — that Delta's "age discrimination" consisted of its failure to change the APA unilaterally and adopt a pilot proposal (known as the "system-wide seniority transfer" proposal) that would have

required bankrupt Pan Am to continue to train Pan Am pilots after the closing for eventual hire by Delta so that the most senior pilots could keep their options open about going to Delta or remaining at Pan Am. 119 F.3d at 104. There is no evidence that Pan Am or its creditors would have ever agreed to the proposal or that it would have made any difference to which Pan Am pilots were ultimately hired by Delta, nor is there any evidence that Delta rejected the proposal for age biased reasons. Thus, the Second Circuit correctly concluded that Delta's "age-neutral explanations for its decision to reject the 'system-wide seniority transfer' proposal" were "unrebutted," and "not effectively contradicted" by Petitioners. *Id.*

C. The Second Circuit Correctly Affirmed the District Court's Judgment Dismissing Petitioners' Age Discrimination Claims Under a Disparate Impact Theory.

Petitioners' disparate impact claim was based on nothing more than a simplistic comparison of the number of Pan Am pilots age 55 and older who remained at Pan Am with the number of Pan Am pilots of the same age who accepted employment at Delta. Petitioners made no attempt to distinguish between those Pan Am pilots who, like Petitioners, elected to remain at Pan Am and those Pan Am pilots who wanted to be hired by Delta but were not. Petitioners submitted no evidence that any facially neutral employment policy disqualified a disproportionate percentage of older Pan Am pilots who wanted to be hired by Delta.

The Court has never decided whether a disparate impact theory of liability is available under the ADEA. *Hazen*, 507 U.S. at 610. The Second Circuit has recognized such an action. *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Maresco v.*

Evans Chemetics, Div. of W. R. Grace & Co., 964 F.2d 106, 115 (2d Cir. 1992). However, the Second Circuit has held that to establish a disparate impact claim under the ADEA, plaintiff must show a disparate impact on the entire protected group, *i.e.*, workers age 40 and older, and not merely a disparate impact on a particular sub-group, *e.g.*, workers age 55 and older. *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372-73 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

In this case, the Second Circuit correctly affirmed the district court's dismissal of Petitioners' disparate impact claims under existing Second Circuit precedent. As the Second Circuit observed, Petitioners "acknowledge that 94.1% of the pilots Delta hired were aged 40 and older and that the hiring scheme had no negative impact on the overall group of Pan Am pilots aged 40 and older." 119 F.3d at 105. Thus, under existing Second Circuit precedent, "[Petitioners'] disparate impact claim cannot survive." *Id.* In any event, Petitioners produced no evidence that would support a disparate impact claim for any sub-group of the protected class.

II. No Issue Worthy of the Court's Certiorari Review is Presented by the Petition.

Petitioners' request for a writ of certiorari should be denied not merely because the Second Circuit's decision was correct, but most importantly because the Petition presents no issue worthy of the Court's certiorari review. The first three legal issues identified in the Petition as "Questions Presented" are not in fact presented by this case, although they would not justify this Court's certiorari review even if they were presented.

Questions Nos. 1-3 are explicitly based on the erroneous premise that the Second Circuit affirmed the dismissal of Peti-

tioners' claims despite finding that Petitioners were subjected to "an adverse employment action based on . . . [their] age" (Questions Nos. 1 and 2) and "based on [their] proximity . . . to a predetermined . . . retirement age" (Question No. 3). The Second Circuit, however, made no such finding. It is undisputed that Delta did not hire Petitioners because their names did not appear on the list of "fully trained and currently qualified" A-310 or B-727 pilots supplied to Delta by Pan Am. The Second Circuit thus correctly affirmed the district court judge's dismissal of Petitioners' age discrimination claims precisely because "the record before the district court raised no genuine factual issue of discrimination on Delta's part." 119 F.3d at 103.

Even Petitioners concede that "this Court may wish to decline to address Question No. 4 as being premature." Pet. 4. That is so, according to Petitioners, because Question No. 4 "relat[es] to the applicability of the disparate impact doctrine to an ADEA subclass, *i.e.*, those persons age 55 and over," but "Petitioners recognize that the threshold issue, whether the so-called disparate impact analysis is cognizable for claims under the ADEA, has not yet been decided by this Court." *Id.*

Moreover, this case is a particularly poor vehicle for the Court to consider whether a disparate impact claim is available under the ADEA, since that issue is purely hypothetical here. First, Petitioners have identified no facially neutral employment policy that disqualified them from employment with Delta. To the contrary, the evidence is undisputed that Petitioners were in fact offered training by Pan Am so that they could become eligible for hire by Delta but they rejected the offer of training. Second, Petitioners have presented no statistical evidence showing that any facially neutral employment policy had an adverse impact on the relevant population — those older

Pan Am pilots who wanted to be hired by Delta but were prevented from doing so by a Delta policy or decision, which is a much different population from those Pan Am pilots who, like Petitioners, rejected Pan Am's offer of training and chose to remain in more lucrative positions at Pan Am.

The Petition satisfies none of the considerations for certiorari review set forth in Sup. Ct. R. 10. The Second Circuit in this case did not decide an important question of federal law that has not been, but should be, settled by this Court, nor did the Second Circuit decide an important federal question in a way that conflicts with relevant decisions of this Court. Although Petitioners contend that particular language used by this Court in its unanimous decision in *Hazen* "has spawned great debate among the Circuits," Pet. 8, Petitioners fail to cite even a single circuit court case expressing confusion or uncertainty over *Hazen*. Nor has the Second Circuit so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Although Petitioners contend that the Second Circuit's refusal to recognize disparate impact claims under the ADEA for sub-groups of the protected class conflicts with the Ninth Circuit's decision in *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), Pet. 22, no conflict is in fact presented. The Ninth Circuit in *Borden's* recognized the disparate impact theory of liability under the ADEA, but it did not consider whether such a claim was available if the challenged employment policy adversely impacted only a sub-group of the protected class, e.g., workers age 55 and older, as opposed to the entire protected class. Instead, in *Borden's*, which predated this Court's more recent ADEA decision in *Hazen* and *O'Connor*, the Ninth Circuit considered only the defendant employer's argument that the disparate impact theory did

not apply to (1) lawsuits under the ADEA or (2) lawsuits concerning employee compensation. 724 F.2d at 1394. Moreover, as noted above, this issue concerns Question No. 4, which, as Petitioners concede, "this Court may wish to decline to address . . . as being premature." Pet. 4.

At most, Petitioners are merely complaining about the Second Circuit's analysis of the particular facts involved in this case. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). Indeed, this Court has indicated that it is even less likely to review a case where, as here, the factual analysis and conclusion of the district court has received the concurrence of the court of appeals. In that situation, the Court has often stated that it is not "a court for correction of errors in fact finding," and that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *accord, Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Here, the EEOC, the district court, and the Second Circuit have all concluded that Petitioners have failed to come forward with evidence that Delta discriminated against them because of their ages. Such "a very obvious and exceptional show of error" is not present in this case.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ASSET PURCHASE AGREEMENT

AMONG

PAN AM CORPORATION,

PAN AMERICAN WORLD AIRWAYS, INC.

PAN AM SHUTTLE, INC.

AND

DELTA AIR LINES, INC.

JULY 27, 1991

ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT dated July 27, 1991 among Pan Am Corporation, a Delaware corporation ("Parent"), Pan American World Airways, Inc., an indirect wholly-owned subsidiary of Parent and a New York corporation ("Airways"), Pan Am Shuttle Inc., a wholly-owned subsidiary of Parent and a Delaware corporation ("Shuttle"), debtors-in-possession (Shuttle and Airways being referred to herein collectively as "Sellers" and each individually as a "Seller"; where appropriate, the terms Seller or Sellers shall refer only to the applicable Seller), and Delta Air Lines, Inc., a Delaware corporation ("Buyer").

* * *

5.9(h)(i) Buyer will offer employment to at least seven hundred (700) of Sellers' pilots, who must be fully trained and currently qualified in the Boeing 727 or Airbus A-310 categories (*i.e.*, Airbus A-310 Captain, Boeing 727 Captain, Airbus A-310 First Officer, Boeing 727 First Officer, Boeing 727 Second Officer) as of November 1, 1991 (subject to subsections 5.9(h)(ii) and (v) hereof), or such other date as may be agreed upon in writing by Buyer and Sellers, and who must meet all of Buyer's standards and requirements for pilots, including without limitation medical requirements, in order to be eligible for consideration by Buyer hereunder. Subject to subsections 5.9(h)(iii) and (vii), Sellers' pilots who meet such requirements will be offered employment with Buyer in seniority order by category. Except as provided in subsection 5.9(h)(ii), such offers shall be for employment effective upon the Closing. Buyer shall determine in its sole discretion the number of Sellers' pilots in each such category to whom Buyer will offer employment.

* * *

(iv) Any training of Sellers' pilots required to make them fully trained and currently qualified in the applicable Airbus A-310 or Boeing 727 categories as described in subsection 5.9(h)(i) hereof shall be the responsibility of and undertaken at the expense of Sellers. Any additional training that Buyer reasonably wishes to provide to Sellers' pilots to prepare them for Buyer's operations (including differences training, indoctrination, familarization, operating specifications, flight operations procedures manual and the like) will be provided at Buyer's expense, using Buyer's training personnel. Sellers shall provide their pilots reasonable time off for such training.

* * *

* * *

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed as of the date first above written.

PAN AMERICAN WORLD AIRWAYS, INC.

BY: /s/ T.G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

DELTA AIR LINES INC.

BY: /s/ Ronald W. Allen
Name: Ronald W. Allen
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

PAN AM SHUTTLE, INC.

BY: /s/ T. G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

PAN AM CORPORATION

BY: /s/ T.G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office

David M. Criley
124 Hillcrest Avenue
Kentfield, CA 94904

Charge No. 160-92-1398

Charging Party

Delta Airlines
P.O. Box 20530
Hartsfield International Airport
Atlanta, GA 30320-2530

Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under The Age Discrimination in Employment Act (ADEA)

* * *

The investigation disclosed no evidence that Respondent intentionally excluded the most senior pilots, nor that Respondent intentionally excluded the oldest pilots. Unintentional exclusion of many of the most senior pilots took place because the most senior pilots were flying equipment which Respondent does not utilize, and they were therefore not current on the equipment which Respondent does utilize.

Respondent requested that Charging Party's former employer provide them with pilots for the equipment being purchased, and gave a deadline of November 1, 1991 for these pilots to be qualified to fly Respondent's equipment.

* * *

The evidence gathered during the investigation does not disclose that Respondent intended to discriminate against Charging Party individually, nor against the most senior pilots as a group, and the ages of the pilots actually hired does not lead to a presumption that there was intent to exclude the oldest pilots or the most senior pilots.

Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

JAN 15 1993
Date

/s/ Spencer H. Lewis, Jr.
Spencer H. Lewis, Jr.
District Director

cc: William H. Boice, Esq.
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enclosure: information sheet on
filing suit in federal
district court

To be argued by
LEONARD N. FLAMM

96-7110

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

v.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

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On the Brief

* * *

. . . Delta has mischaracterized the instant case as one involving a "failure to hire"; in fact, the age discrimination occurred *before* the hiring took place.[17]. . .

* * *

Dated: April 18, 1996
New York, New York

Respectfully Submitted,

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Supreme Court, U.S.
FILED
DEC 10 1997
CLERK

(3)

No. 97-636

In The

Supreme Court of the United States

October Term, 1997

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Petitioners,

vs.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Delta's Brief in Opposition does not deny that Questions Nos. 1 through 3 involve significant and far-reaching legal issues under the ADEA relative to the interpretation of the *Hazen* case. Nor does the Brief dispute that the issues raised by Question Nos. 1-3 mirror a profound and growing conflict in the Federal Courts which should be resolved by this Court. Instead, the Brief skirts these points by arguing that the Second Circuit's extended discussion and analysis of the *Hazen* case, and its impact on Plaintiffs' proffered evidence of age bias, were mere "dicta" or "purely hypothetical". (Resp. Brief at 15).

To support its claim, Delta posits the fiction that Plaintiffs did not prevail below because their overall evidence was found to be insufficient to support a finding that Delta had refused to hire pilots because they were age 55 or older. From this, Delta argues that a reversal by this Court on the legal issues raised by Question Nos. 1 to 3, however significant they may be, would not result in Plaintiffs' prevailing on remand.

Delta has irresponsibly misrepresented the Second Circuit's *ratio decidendi*. The Second Circuit did *not* reject Plaintiffs' claims, as Delta suggests, because of any shortfall in the quanta of age-based evidence adduced below by Plaintiffs. To the contrary, Plaintiffs' proffered evidence of age-based action was found to raise an inference that Delta had indeed acted on the basis of the Plaintiffs' ages. It was rejected as insufficient to support Plaintiffs' claims only because, when reviewed in the light of *Hazen*, such evidence did not reflect any age-pejorative bias by Delta.

Delta's attempt to blur this critical distinction between evidence of age-based activity, which Plaintiffs did produce below, and evidence of age-pejorative activity, which Plaintiffs were found not to have adduced, should be rejected.

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE "AGE STEREOTYPING" ISSUE

Most of Delta's Brief consists of a discussion of why the Second Circuit's holding, from a narrow analysis of the facts, was correct. Arguing for the correctness of the decision on this basis misses the point. The issue before this Court is not whether the Second Circuit overlooked or failed to credit certain facts, but whether its rejection of Plaintiffs' evidence of age-based activity, based on its interpretation of *Hazen*, was correct. It is the Circuit's rejection of this evidence of age-based activity, as not meeting the supposed requirements of *Hazen*, and not because of any quantitative sufficiency, which is the issue raised for certification to this Court by Question No. 1.

That the Second Circuit did *not* reject Plaintiffs' case because of evidence insufficiency, as Delta claims, is clear from the Circuit's acknowledgment that Plaintiffs had adequately presented "evidence in which Delta personnel might be understood to be making reference to age". (6a).[1] The Second Circuit rejected such evidence because, in its view, it did not "reflect any age-based stereotype or belief that older pilots are less competent than younger ones". (*Id.*) — and not for any other reason. The Circuit's further assertion, that such evidence "might support an inference that Delta was reluctant to hire pilots who would shortly be disqualified from piloting and might begin drawing pension benefits" confirms that evidence insufficiency *per se* was not the basis for its decision. (*Id.*)

In concluding that, under *Hazen*, such evidence was not

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1. References followed by an "a" are to a page number of the appendix annexed to the Petition.

indicative of age discrimination because it did not show age-pejorative stereotyping (7a), the Second Circuit's interpretation only deepens an existing conflict in the Federal Courts on this issue, If certiorari is granted as to Question No. 1, Petitioners will show that Delta's refusal to hire pilots age 55 and over, because of the FAA's Age-60 Rule, or because they would soon reach an age to begin drawing down pension benefits, constituted age discrimination *per se*, without regard to any further showing of age-pejorativeness.[2]

II.

THE "ECONOMIC CONSIDERATIONS" ISSUE

Question No. 2 raises the issue of whether an "economic considerations" defense is viable to employees under *Hazen*.

On this issue, the Second Circuit found that Delta's "concern about the economic consequences of employment decisions [did] not constitute age discrimination under the ADEA, even though there may be a correlation with age." (6a). The Second Circuit based this finding on its interpretation that *Hazen* authorizes an economic justification defense to all ADEA claims.

In Petitioners' view, nothing in *Hazen* supports such a reading. If this Court believes that the availability of an "economic considerations" defense under *Hazen* is an issue that divides the Federal Courts and warrants review, certiorari should be granted as to Question No. 2.

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2. Petitioners noted in their Opening Brief that "those persons who would shortly be disqualified from piloting and might begin drawing pension benefits" were in that position solely by virtue of their attaining a certain age because of the FAA's Age-60 Rule. (Pet. at 17-21).

III.

THE "ON THE VERGE OF RETIREMENT" ISSUE

Question No. 3 raises the issue of whether it is proper for an employer to consider an employee's proximity to a future retirement date as a reason to reject or fire that employee in the present.

At bar, the Second Circuit found that Delta was justified in rejecting Petitioners because of the

> inefficiency and expense of hiring large numbers of [older pilots] *on the verge of mandatory retirement* . . . even though their retirement was required by law at a specified age, and not determined by years of service or some other yardstick.

(7a). (Emphasis added).

The Circuit based that finding on its interpretation of *Hazen*. If this Court agrees that this interpretation of *Hazen* should be reviewed, certiorari should be granted as to Question No. 3.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted in all respects.

Respectfully Submitted,

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